ARAB-MALAYSIAN FINANCE BHD

v.

SAMIAN SABIN & ANOR

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[CIVIL APPEAL NO: 12-13-2001]
21 FEBRUARY 2003

HIRE-PURCHASE: *Breach of agreement - Delivery of registration card of motor vehicle by financier to hirer - Whether a condition precedent to operation of hire-purchase agreement - Whether non-delivery a breach of fundamental term - Whether there was a total failure of consideration – Whether hirer may treat agreement as discharged - Whether hirer may sue for damages for breach of agreement - Whether may sue on quasi-contract for return of down-payment*

HIRE-PURCHASE: *Ownership - Motor vehicle under hire-purchase - Whether financier or hirer has legal ownership - Hire-Purchase Act 1967, s. 2(1) - Inapplicability of ss. 2 and 13(2)(d) and (3) of Road Transport Act 1987 - Whether financier contractually obliged to produce registration card for registration in name of hirer - Non-delivery of registration card to hirer, effect on hire purchase agreement*

WORDS & PHRASES: *"owner" - Hire-Purchase Act 1967, s. 2(1) - Definition of - Inapplicability of ss. 2 and 13(2)(d) and (3) of Road Transport Act 1987*

This was an appeal by the plaintiff/finance company against the decision of the sessions judge dismissing its claim against the defendants and allowing the defendants' counterclaim. The plaintiff had earlier sued the defendants on a hire-purchase agreement entered into with the 1st defendant/hirer and guaranteed by the 2nd defendant. The issue central to the instant appeal concerned the non-delivery of the registration card of the motor vehicle ('the bus') under the hire-purchase agreement to the hirer, and the corollary of such non-delivery upon the hire-purchase agreement itself.

Held:

[1] The plaintiff had never delivered the registration card or log book of the bus to the hirer, as a result of which, the hirer's use of the bus was incapacitated as he was unable to effect payment of the road tax for the bus. (p 118 b-c)

[2] The 'owner' of the bus under the hire-purchase agreement was undoubtedly the plaintiff. The law applicable in this respect was s. 2(1) of the Hire-Purchase Act 1967 and **not** ss. 2, or 13(2)(d) or (3) of the Road Transport Act 1987; *generalia specialibus non derogant*. (pp 118 f-h & 119 a-f)

[3] As the owner of the bus (let out on hire to the hirer), the plaintiff should have produced the registration card for registration in the name of the hirer; this was a condition precedent to the operation of the hire-purchase agreement. The non-delivery of the registration card to the hirer was, therefore, a breach of a fundamental term of the hire-purchase agreement as there was a total failure of consideration. Consequently, the hirer was entitled to treat the hire-purchase agreement as discharged and either counterclaim for damages for the breach of the hire-purchase agreement or bring an action in quasi-contract for the return of the down-payment already made to the plaintiff. (pp 118 g, 119 g-h, 120 d-h & 121 a)

[Plaintiff's appeal dismissed; decision of sessions judge affirmed.]

Case(s) referred to:
BBMB Kewangan Bhd v. Tan Swee Heng & Anor [2002] 7 CLJ 377 HC ***(refd)***
Bentworth Finance Ltd v. Lubert [1967] 2 All ER 810 ***(foll)***
Credit Corp (M) Bhd v. The Malaysian Industrial Finance Corp & Anor [1976] 1 MLJ 83 ***(refd)***
Hwa Chea Lin v. Malim Jaya (Melaka) Sdn Bhd [1996] 4 MLJ 544 HC ***(refd)***
Low Ping Ming v. MBf Finance Bhd [2002] 2 CLJ 30 HC ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 40
Hire-Purchase Act 1967, s. 2(1)
Road Transport Act 1987, ss. 2, 13(2)(d), (3)

Other source(s) referred to:
Andrew Phang Boon Leong, *Cheshire, Fifoot and Furmston's Law of Contract*, second Singapore and Malaysian edn, 1998, p 1117
RM Goode, *Hire-Purchase Law And Practice*, 2nd edn, p 215

For the plaintiff - Hargopal Singh; M/s Hargopal Singh & Co
For the 1st & 2nd defendants - A Sethu; M/s Syarikat A Sethu

Reported by Gan Peng Chiang

JUDGMENT

Low Hop Bing J:

Appeal

This is an appeal by the plaintiff against the decision of the learned sessions court judge who had on 1 February 2001 dismissed with costs the plaintiff's claim for RM60,574.72 and allowed the defendant's counterclaim for RM17,000 with interest and costs.

Facts Of The Case

On 1 April 1992, the plaintiff and the first defendant entered into a hire-purchase agreement wherein the plaintiff had granted to the first defendant hire-purchase facility for the purpose of purchasing a motor vehicle ie, a bus bearing registration number DG 2273.

On the same same date, the second defendant executed a guarantee wherein the second defendant guaranteed the due and punctual payment by the first defendant of all sums payable under the hire-purchase agreement to the plaintiff.

The first defendant's failure or neglect to pay according to the terms of the hire-purchase agreement resulted in the plaintiff's commencement of this action against the defendants for the aforesaid sum of RM60,574.72 as at 12 February 1998.

The defendants in addition to their defence filed the said counterclaim against the plaintiff.

Existence Of Hire-Purchase Agreement

The learned sessions court judge stated in the grounds of decision that the plaintiff has failed to produce the hire-purchase agreement and the guarantee as documentary exhibits since these documents were merely marked as ID2 and IDS respectively ie, for purposes of identification as opposed to the marking as exhibits such as "P2 and P3". Be that as it may, in the appeal before me, upon the submission by learned counsel En. Hargopal Singh for the plaintiff that the first and second defendants had expressly admitted the execution of these two documents, this execution of the two documents was conceded by learned counsel En. A. Sethu for the first and second defendants.

In the circumstances, the existence of these two important documents which are now the subject matters of the appeal herein had never been doubted and so the appeal shall henceforth be proceeded with on this basis.

In the light of the said admission by the first and second defendants the failure on the part of the plaintiff in calling the manager of Eul Motors or the officer signing these two documents on behalf of the plaintiff as witnesses would in my view be of no consequence at all.

Registration Card For The Bus

The submission for the plaintiff in the appeal before me did demonstrate and indeed confirm the finding of fact by the learned sessions court judge that from the date of the execution of the two documents until now the plaintiff had not given the defendants the registration card or the log book for the bus, in which case the defendants' use of the bus was incapacitated in that the defendants were unable to effect payment of the road tax for the bus which meant that the bus could not be on the road at all.

Learned counsel for the plaintiff attempted to overcome this issue by explaining that in practice the registration card of a motor vehicle was usually handed over by the previous registered owner to the new owner and that if this was not done, the new registered owner could apply to the Road Transport Department for a new registration card in order to renew the road tax. He added that the registration card was not kept by the finance company such as the plaintiff unless there was express consent of the hirer. It was argued for the plaintiff that at most, the plaintiff's non-delivery of the registration card is only a breach of warranty which merely entitled the defendants to damages.

On the defendants' inability to use the bus, it was contended for the plaintiff that the bus in question was manufactured in 1980 and that being a second hand bus, all conditions and warranties as to quality and as to fitness and suitability were expressly negatived.

For the defendants, it was submitted that the provisions of s. 13(2)(d) and s. 13(3) of the Road Transport Act 1987 in relation to the definition of "owner" would not apply but instead its definition is governed by the provisions of s. 2(1) of the Hire-Purchase Act 1967. In this context, he added that the plaintiff was the owner who should produce the registration card for registration in the name of the first defendant, which he said was a condition precedent to the operation of the hire-purchase agreement. He stressed that the non-delivery of title was a breach of a fundamental term by the plaintiff and that there was a total failure of consideration.

In my judgment, I hold that there is merit in the submission for the defendants that the definition of "owner" in the context of the present appeal which concerns a hire-purchase agreement was to be governed by s. 2(1) of the specific Act ie, the Hire-Purchase Act 1967, in which case the definition of

"owner" in s. 2 of the Road Transport Act 1987 would not apply. *Generalia specialibus non derogant*: see also *BBMB Kewangan Bhd v. Tan Swee Heng & Anor* [2002] 7 CLJ 377 at p. 392 per Ramly Ali J.

The first defendant was the hirer and even if the hirer were the registered owner of the car, the hirer was in law the person who had possession and use of the car and that fact did not necessarily make him the legal owner of the car: per Abdul Hamid J (later LP) in *Credit Corp. (M) Bhd v. The Malaysian Industrial Finance Corp & Anor* [1976] 1 MLJ 83.

In the circumstances, by virtue of s. 2(1) of the Hire-Purchase Act 1967, an owner means a person who lets or has let goods (here the bus) under a hire-purchase agreement and includes a person to whom the owner's rights or liabilities under the agreement have passed by assignment or by operation of law. The plaintiff is in my view the owner for the purposes of the hire-purchase agreement which also described the plaintiff as the owner of the goods ie, the bus let on hire.

A classic description of a hire-purchase agreement was given by Steve Shim J (now CJ (SS)) in *Low Ping Ming v. MBf Finance Bhd* [2002] 2 CLJ 30 as follows:

A common characteristic or feature of such an agreement is that the hirer has the option of purchasing the goods. And throughout the period of hire-purchase, title to the goods remains with the owner.

> It is common practice nowadays for a finance company to be involved in a hire-purchase transaction as owner. For example the finance company buys the goods from the dealer who is paid the price and the finance company then steps into the dealer's shoes and becomes the owner for the purpose of the hire-purchase agreement. In this way, the finance company becomes the owner as well as financier.

Being the owner, it is the plaintiff's duty to produce the registration card for registration in the name of the first defendant and then to endorse thereon the plaintiff's claim of ownership, but the plaintiff has failed to do so, as a result of which the defendants were unable to renew the road tax and use the bus on the road as a school bus.

It is also the plaintiffs duty as owner to transfer possession of the goods ie, the bus from the plaintiff to the first defendant as hirer, as the hiring did not commence until the bus has been delivered to the hirer and that delivery shall be accompanied by the registration card to enable the hirer to pay or renew the road tax in order to bring the bus to function on the road.

A substantially similar situation arose in *Bentworth Finance Ltd v. Lubert* [1967] 2 All ER 810, where the plaintiff finance company agreed to let a car to L under a directly financed transaction under which M agreed to act as surety for L. The dealer left the car, unlicensed and untaxed outside L's house, and L neither used the car nor paid any instalments. In dismissing the plaintiff's action against L for arrears of instalments and against M under the contract of surety, the English Court of Appeal held that it was an implied condition of the hire-purchase agreement that the log book should be supplied, and until it was supplied there was no contract and no instalment became due and that the loss or damage that the plaintiffs suffered did not arise from the hire-purchase agreement being unenforceable, but from the plaintiffs allowing the car to be delivered by the dealers without the log book.

Lord Denning MR said at p. 811, *inter alia*, that it is the common understanding of people that, if a car is bought or is taken on hire-purchase, the log book will be provided and that it is a practical necessity also for the hirer to have the log book. He has to produce it in order to get the car licensed so as to be on the road. The learned Master of the Rolls added that the provision of the log book is a condition on which the very existence of the contract depended, and that until the log book was provided there was no contract of hire-purchase at all. No instalment, therefore, fell due.

Further, I agree with the learned author, RM Goode, in his book *'Hire-Purchase Law And Practice'* 2nd edn, at p. 215 that in most hire-purchase contracts, the condition of title is a fundamental obligation and that:

> On breach of the condition of title, the hirer becomes entitled to treat the agreement as discharged and may either sue for damages for breach of contract or bring an action in quasi-contract for the return of all monies paid by him under the agreement as having paid on a consideration which has wholly failed.

In the light of the fundamental breach of the plaintiff arising out of the non-delivery of the registration card or log book to the first defendant and so the incapacitation of the first defendant's use of the bus in question which goes to the root of the hire-purchase agreement, the first defendant is entitled to treat himself as having been discharged from further liability under the hire purchase agreement: s. 40 of the Contracts Act 1950; *Hwa Chea Lin v. Malim Jaya (Melaka) Sdn Bhd* [1996] 4 MLJ 544 per Suriyadi J.

On the total failure of consideration in relation to the RM17,000 paid by the first defendant to the plaintiff pursuant to the hire-purchase agreement for which no registration card was delivered by the plaintiff to the first defendant, the first defendant may either rely on the plaintiff's breach of the hire-purchase

agreement and claim for damages or sue the plaintiff on the basis of quasi-contract for the return of the money. (See *Cheshire Fifoot and Furmston's Law of Contract*, second Singapore and Malaysian Edn. 1998 by Andrew Phang Boon Leong, p. 1117 "Total Failure of Consideration"). This was essentially expressed in the defendant's counterclaim against the plaintiff.

Conclusion

On the foregoing grounds, I am of the view that the decision of the learned sessions court judge was correct which I hereby affirm. I therefore dismiss this appeal with costs.